

Government of the District of Columbia

ZONING COMMISSION



ZONING COMMISSION ORDER NO. 698

Case No. 91-5

(Sua Sponte Review of
Board of Zoning Adjustment
Order No. 15361)
July 8, 1991

SUMMARY DECISION

This matter is before the Zoning Commission pursuant to the sua sponte review process that is set forth in 11 DCMR 3103. Having considered the record of the Board of Zoning Adjustment in Application No. 15361, the memoranda of the parties in support of and in opposition to the action of the Board, and the argument by the parties, the Commission has decided to reverse the decision of the Board, and to remand the case to the Board for action consistent with the following Findings of Fact, Conclusions of Law, and Decision.

FINDINGS OF FACT

1. In order No. 15361, which became final on March 8, 1991, the Board of Zoning Adjustment approved a variance from the use provisions of then proposed 11 DCMR, Chapter 17, which would have required construction of residential floor area on the site of the project.
2. In addition to the use variance, Board Order No. 15361 granted certain relief that is not modified by this Order, and which the Commission therefore will not address.
3. Although the findings of the Board in Order No. 15361 cite in support of the use variance several minor aspects that relate to the particular property, the predominant weight of the factors that the Order cites are not unique to the property.
4. To the extent that the factors cited are uniquely related to the property, those factors, in their totality, do no more than suggest that development of the property as required by the Zoning Regulations may

be challenging. Nothing in the record before the Board or Commission persuasively supports a finding that the property is not capable of being used in accordance with the Zoning Regulations.

5. In addition, the site-related factors, on their face, are ones that are within the ability of the applicant to control. That is, the applicant has the ability to determine where, on the overall site, it is reasonable and practical to locate the required residential floor area.
6. The applicant did not demonstrate that a rationally designed building configuration on the over-all site could not have accommodated the requirements of the Zoning Regulations.
7. Applicant presented no substantial evidence about efforts to locate the required residential floor area on the site. In lieu thereof, applicant presented certain evidence to the effect that the applicant had entered into private contracts that substantially reduced the flexibility of site development.
8. Applicant presented no evidence about using the alternative of combined lot development.
9. The record does not support reliance on the testimony about financial return as a basis for a use variance. Nothing of record shows that this factor is peculiar to the site. The evidence is in fact to the direct opposite, that is, that this factor applies generally.
10. In short, the applicant's presentation of its case to the Board did not recognize, to any extent, that the District is authorized to determine the land use policies for Downtown, nor that the applicant had any degree of obligation to be constrained by those policies.
11. The Commission by this Order reverses the Board's decision, but allows the applicant to pursue alternative relief, consistent with applicable law. It is the Commission's view that this approach will be viable only if the applicant fundamentally alters its approach, and accepts the District's land use policy as establishing the framework within which development is to take place.

CONCLUSIONS OF LAW

1. The applicant's request for a variance grounded the claimed hardship in large part on factors that are not unique to the site, and which therefore cannot stand as bases for the Board's decision.
2. The applicant erroneously invited the Board to evaluate the relative merits of the WETA use and residential use on the site. This error caused the Board decision to be based in part upon the Board's entering into a policy area that is vested in the Commission, that is, the evaluation of the relative merits of two types of land use. The Zoning Commission has already conducted this evaluation, and it is binding on the Board. Alternative uses to residential use do not fulfill the policies that the Commission has enacted into Chapter 17 of the Zoning Regulations.
3. The only way that the \$2 million contribution for an off-site amenity would bear a relation to the standards that are set forth in D.C. Code Sec. 5-424(g)(3) (1988), would be to support a finding that the approved relief could be granted "without substantial detriment to the public good and without impairing the intent, purpose and integrity of the ... zoning regulations...." At the time that the Board decided Application No. 15361, the Zoning Commission had not taken preliminary action on the off-site housing component of Zoning Commission Case No. 89-25. Accordingly, the Board did not have a complete predicate for evaluation of the contribution.
4. When a request for a use variance is based on contractual commitments, it is essential that the applicant submit the relevant provisions of the written contracts that contain the commitments. The Board must be in a position to determine, by its own analysis, the extent of the claimed constraints, and whether they establish a hardship that is cognizable as a basis for a variance.
5. In sum, the approval of a use variance from the entirety of the residential floor area requirement effectively accepts, as given, the project as conceived by the applicant, and accordingly modifies the application of the Zoning Regulations. But the opposite is required. The Zoning Regulations are the given, and it is the applicant's task to accommodate those requirements.

DECISION

1. The Order of the Board in Application No. 15361 is reversed.
2. Although a court might be required to reverse the Board decision outright, the Commission has greater flexibility under 11 DCMR 3103. For that reason, the Commission does not preclude the applicant from pursuing alternative relief, subject to the following provisions.
3. If the applicant decides to submit a revised proposal to the Board, the applicant shall:
 - a. Submit the documentary evidence that establishes the basis for any claimed contractual constraint on development flexibility;
 - b. Submit alternative development plans that evidence a diligent, professional effort to resolve site constraints in a way that effects the maximum practical compliance with the Zoning Regulations;
 - c. Submit evidence of its consideration of combined lot development and other available alternatives;
 - d. Terminate its citation of factors that are not unique to the property, for example, multiple overlays, financial return "requirements," and location in the historic district;
 - e. Clarify its reliance on the \$2,000,000 contribution to off-site housing, in relation to D.C Code Sec. 5-424(g)(3) and the off-site housing provision of Chapter 17 of Title 11 ; and
 - f. Submit for the record the specific floor area ratio and gross floor area that WETA would use for active arts use, as distinguished from office use.
4. In considering any revised application, and in its evaluation whether the relief can be granted without substantial detriment to the public good, and without substantially impairing the intent, purpose, and integrity of the Zone Plan, the Board should:
 - a. Consider the goals and policies as set forth in Chapter 17 of the Zoning Regulations, including the specific application of the residential use


provisions of that Chapter to Square 456;


- b. Exercise reasonable care about accepting the entirety of the WETA use, including in particular the office area, as equivalent to residential use;
- c. Require a more rigorous showing of the particular circumstances of the site that the applicant contends establish an undue hardship; and
- d. Examine any claimed constraints on development of the site that result from agreements entered into by the applicant in light of the applicable legal principles that preclude the grant of a use variance that is based upon a self-imposed hardship. Foxhall Community Citizens Association v. Board of Zoning Adjustment, 524 A.2d 759 (D.C. App. 1987)

Based upon the foregoing, the Order of the Board of Zoning Adjustment in Application No. 15361 is REVERSED without prejudice to the pursuit by the applicant of further relief, consistent with this Order.

This Order was revised and adopted by the Zoning Commission at its meeting on July 8, 1991, by a vote of 3-2 (Teresh Boasberg and John G. Parsons to adopt; George M. White to adopt by proxy vote; and Maybelle Taylor Bennett and Lloyd D. Smith opposed to adoption).

In accordance with the 11 DCMR 3028, this order is final and effective upon publication in the D.C. Register, that is, on JUL 26 1991.


MAYBELLE TAYLOR BENNETT
Chairperson
Zoning Commission


EDWARD L. CURRY
Executive Director
Zoning Secretariat